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Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

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No. [redacted]106

PEOPLE OF THE STATE OF ILLINOIS ex rel. WILLIAM J. KENNEDY,

Petitioner,

vs.

STEPHEN E. HURLEY, CHARLES A. LAHEY and ALBERT W. WILLIAMS, CIVIL SERVICE COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS.

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WILLIAM J. KENNEDY, petitioner, prays that a writ of certiorari be issued to review the decree of the Appellate Court of Illinois entered in the above cause on October 28, 1952 reversing the judgment of the Circuit Court of Cook County, Illinois.

OPINIONS BELOW.

The trial court filed no opinion.

The opinion of the Appellate Court of Illinois is reported in 348 Illinois Appellate 265.

The Supreme Court of Illinois filed no opinion.

JURISDICTION.

The judgment of the Appellate Court sought to be reviewed was entered on October 28, 1952. (R. 60) Petitioner filed a petition for rehearing which was denied on December 9, 1952. Petition for leave to appeal to the Supreme Court of Illinois was denied on March 11, 1953. The jurisdiction of this Court is invoked under Section 210 (C) of the Judicial Code of 1949. See also Rule 38 of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED.

Whether loss of transcript of trial proceedings by respondent—either deliberate or otherwise—was not such a violation of the right of petitioner under the 14th Amendment as to deprive him of his property without due process of law.

STATUTE INVOLVED.

The Statute involved is:

Section 12, Civil Service Act, Chap. 24½.
Smith-Hurd Illinois Annotated Statutes.

STATEMENT OF THE CASE.

The petitioner, William J. Kennedy, was a police officer of the City of Chicago for 17 years, all of which time he had an unblemished record for honesty, integrity and courage.

Unfortunately for petitioner in 1938 an effort was made to organize a Union of Private Detectives. The man seeking to organize said Union was named Kennedy, although petitioner had nothing to do with the Union. This coincidence was the basis for the charges placed against petitioner before the Civil Service Commission.

The Civil Service Commission ordered him discharged from the police force.

Petitioner thereafter filed a petition for a writ of certiorari to review the findings of the Civil Service Commission. Said petition for a writ of certiorari was assigned to the Honorable Harry M. Fisher, Judge of the Circuit Court of Cook County.

Respondents then started a course of conduct calculated to dispose of the action without disclosing that either they did not wish to produce, as required by law, or had lost the transcript.

In their return to the writ of certiorari they stated: "That the following is a full, true and complete transcript of the record of said proceedings affecting said plaintiff certified by the said Civil Service Commission of the City of Chicago." (R. 33)

When petitioner disclosed that there was no transcript the court ordered respondents to produce same. (R. 57) The respondents simply stated:

> "I might say the reason we haven't attached the transcript of evidence in this case, is this, the transcript has been lost. We can't find it. We only make one transcript and that has been lost and the court reporter's notebook has also been lost, so we cannot make a new transcript." (R. 51)

When this disclosure was made Judge Fisher reversed the finding of the Civil Service Commission and ordered petitioner reinstated. (R. 57)

From this order of Judge Fisher respondents appealed. The Appellate Court reversed Judge Fisher, (R. 60) and ordered the findings of the Civil Service Commission reinstated.

Petition for leave to appeal to the Supreme Court of Illinois was denied.

SPECIFICATION OF ERROR TO BE URGED.

The Appellate Court of Illinois erred:

1. In failing to hold that the loss of the transcript and failure to produce same was a violation of the constitutional right of Petitioner which guarantees that he shall not be deprived of his property without due process of law.

REASONS FOR GRANTING THE WRIT.

Petitioner by action of respondents and through no fault of his own was deprived of the right to effective review of his case and of due process of law in violation of the 14th Amendment.

The Appellate Court of Illinois has sanctioned a departure from the accepted and usual course of judicial proceedings by acquiescing in the wrongful disposition by respondents of the transcript of testimony. The "loss" of the transcript of testimony deprived petitioner of the right to show the lack of jurisdiction as well as the glaring passion and prejudice of the Civil Service Commission in ordering petitioner discharged from the Police Department of the City of Chicago.

The Civil Service Commission acting under the authority of Sec. 12, Civil Service Act, Smith-Hurd Illinois Annotated Statutes, Chap. 24½, Par. 51 (see App. pp. 9) held a number of hearings on charges placed against petitioner by the Commissioner of Police of the City of Chicago.

On April 15, 1940 only two of the Civil Service Commissioners signed an order to discharge petitioner from the service of the City of Chicago, which said order of discharge was never approved by the full Commission, as required by law.

Petitioner thereafter filed his petition for writ of certiorari. Respondents filed their return. In spite of the

fact that the transcript of testimony was not included in the return[1] as required by law,[2] respondents certified:

> "That the following is a full, true and complete transcript of the record of said proceedings affecting said plaintiff certified by the said Civil Service Commission of the City of Chicago:"

Upon notice to the court that the transcript was in fact not included in the return and later upon insistence of the court that the transcript of testimony be presented forthwith respondents finally stated (R. 51):

> "I might say the reason we haven't attached the transcript of evidence in this case, is this, the transcript has been lost. We can't find it. We only make one transcript and that has been lost and the court reporter's notebook has also been lost, so we cannot make a new transcript."

When this admission was made by respondents Judge Fisher stated: (R. 57)

> "The Court: This fails to show that I ordered you to produce the transcript and you then came in and said that it was lost."

and also:

> "The Court: But don't you see that on certiorari the only time you are required to produce the transcript is if the Court orders you to do it, and I did, and that is the whole proceeding here and that is not shown. I quashed the return because the transcript was not there."

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[1] Opinion of the Corporation Counsel of the City of Chicago (1923-1924) page 267: "17. The stenographer employed at the said hearing shall transcribe his notes immediately following said hearing, and these notes so transcribed with proper affidavit of the stenographer attached to same shall constitute part of the records of the case."

[2] The Civil Service Commission in its "findings and decision" stated: That they met, (R. 37) "for the purpose of investigating the foregoing charges, (against petitioner) proceeded to hear and did hear testimony of the witnesses, a record of which is preserved and on file in the office of the Commission."

Since jurisdiction by the Civil Service Commission was controlling, it could only be proved by the transcript of the testimony. The applicable rule is stated in *Funkhouser* v. *Coffin*, 301 Ill. 257, 261:

> "There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction. Nothing is taken by intendment in favor of such jurisdiction but the facts upon which the jurisdiction is founded must appear in the record."

To the same effect: *Hahnemann Hospital* v. *Industrial Board*, 282 Ill. 316, 318.

> "The record must show facts giving the inferior tribunal jurisdiction, and mere conclusions of law are not sufficient."

In the leading case of *People ex rel. Fosse* v. *Allman*, 329 Ill. App. 296, 301-302, the court stated:

> "• • • Plaintiff asserts that the recitals in the return are not enough to show jurisdiction; that they are nothing more than mere conclusions; and that the testimony must be included, which is the only sure and safe way to show that the required jurisdictional facts were actually present.
>
> "We agree with plaintiff that where the jurisdiction of the Commission is challenged, the return should include the transcript of the testimony. In the instant case the testimony is a part of the record of the Civil Service Commission. The return so recites. The courts are not precluded by the Commission's mere recital. 'The record must show that the board acted upon evidence and contain the testimony upon which the decision was based, in order that the court may determine whether there was any evidence fairly tending to sustain the order.' "

The naked statement without proof by respondents that the transcript of testimony and stenographer's notes were lost was entirely lacking in significance and was certainly

a fatal defect in their return. The requirement was succinctly stated by the Appellate Court of Illinois in *Cartan* v. *Gregory*, 329 Ill. App. 307, 320-321:

> "Defendants contend that they are not required to return a transcript of the testimony. We hold that where the action of the Commission in discharging an employee is challenged on the ground that the jurisdictional requisites were not met, as in the instant cases, that the record must include the transcript of the testimony."

Obviously petitioner has been denied a fundamental right.

CONCLUSION.

Petitioner, a respected member of the police force of the City of Chicago for upwards of 17 years, has through no fault of his own been denied the right to an effective review of the findings of the Civil Service Commission.

Moreover, the protection of public officers from persecution is of just as much public importance as the punishment of those who abuse public trust—for otherwise public officers must inevitably be stultified by fear and deterred from effectual service. The public interest is, therefore, doubly involved in this case—that, in a democracy, justice shall be fair, regular, and in accord with the law of the land; and that the officials of the state shall be protected to the same extent as other citizens.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL D. GLASSER,
Counsel for Petitioner.

JOHN F. TYRRELL,
EUGENE R. WARD,
Of Counsel.

APPENDIX.

Smith-Hurd Illinois Annotated Statutes: Chapter 24½—Section 12.

51. Removals—Suspensions

No officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days. In the course of an investigation of charges each member of the commission, and of any board so appointed by it, and any officer so appointed shall have the power to administer oaths and shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. Nothing in this section shall be construed to require such charges or investigation in cases or laborers or persons having the custody of public money, for the safe keeping of which another person has given bonds. (1895, March 20, Laws 1895, p. 85, §12.)

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IN THE

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No. 848

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* WILLIAM J. KENNEDY,

Petitioner,

vs.

STEPHEN E. HURLEY, CHARLES A. LAHEY, and ALBERT W. WILLIAMS, CIVIL SERVICE COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO CERTIORARI.

OPINION BELOW.

The opinion of the Appellate Court of Illinois for the First District is officially reported in 348 Ill. App. 265, and also is set forth in the printed transcript of the record herein (R. 65-75).

Inaccuracies in Petitioner's Statement of the Case.

Petitioner's statement of the case contains a strange but serious error, namely, that the petitioner (Kennedy) was not the person who had committed the wrongs charged and proved against him on the hearing before the Civil Service Commission, but was a totally different person bearing the same name (Petition, p. 3). There is no basis whatever in the record for this assertion, and this is the first time that the petitioner has made such a claim. Moreover, the findings of fact contained in the Commission's "Findings and Decision" (R. 37-41) are sufficiently specific as to evidentiary detail to establish that the petitioner did commit the wrongful conduct for which he was ordered discharged (R. 39-41).

The petition makes a further serious mis-statement when it accuses the Civil Service Commission of improper practice in reciting in its return to the writ of certiorari (on the review by the Circuit Court of Cook County of the decision of the Civil Service Commission) that the matters and things contained in said return constituted "a full, true and complete transcript of the record" of the proceedings before the Civil Service Commission, although it knew that the transcript of the evidence was not included in the return because it had been lost (Petition, pp. 2-3). However, the record herein discloses that the Commission expressly qualified its certificate by reciting that the matters contained in the return constituted "a true, full and complete record of the proceedings * * * except for the transcript of evidence taken at said hearing, which said transcript has been lost" (R. 42-43).

STATEMENT OPPOSING JURISDICTION.

The only statute upon which petitioner predicates the jurisdiction of this court is Section 2101 (c) of Title 28, United States Code, which is erroneously referred to in the petition (p. 2) as "Section 210 (C) of the Judicial Code of 1949." But this section merely prescribes the 90-day limitation period for review. The petition makes no reference to Section 1257 (3) of Title 28, United States Code, which is the relevant section applicable to the review of State court judgments by certiorari; nor does the record disclose that any federal question, substantial or otherwise, was involved, presented or decided on this record. Indeed, it appears clearly from the opinion of the Appellate Court (R. 65-75), whose judgment the petitioner is asking this court to review, that the Appellate Court did not decide or dispose of any constitutional question.

Moreover, the Appellate Court of Illinois, which is an intermediate appellate tribunal, is without power to determine constitutional issues. Under Section 75 (1) of the Illinois Civil Practice Act, (Chap. 110, par. 199 (2), Ill. Rev. Stat. 1951), the Supreme Court of Illinois is the only court which has the power to pass upon constitutional questions which have been presented to and decided by the trial court, and the party seeking a review of such questions must take an appeal directly from the trial court to the Supreme Court. If the appeal is taken to the Appellate Court of Illinois, all constitutional issues are waived, and when the case proceeds from the Appellate Court to the Supreme Court for further review, no constitutional question is presented for decision in view of such waiver. (*Parker* v. *Illinois*, 333 U. S. 571, 92 L. Ed. 886; *Central*

Union Telephone Company v. *City of Edwardsville*, 269 U. S. 190, 193-195, 70 L. Ed. 229; *People* v. *Richardson*, 397 Ill. 84, 91, 72 N. E. (2d) 851; *People* v. *Rosenthal*, 370 Ill. 244, 247, 18 N. E. (2d) 450.)

While it is true that the appeal from the trial court to the Appellate Court of Illinois was taken by the respondents herein, (against whom the trial court had ruled adversely), it was nevertheless incumbent upon the petitioner to ask for a transfer of the cause from the Appellate Court to the Supreme Court of Illinois if he did not wish to waive any constitutional question which might have been involved in the case. By failing to request a transfer of the cause to the Supreme Court, and contenting himself with permitting the case to remain in the Appellate Court, the petitioner has waived all constitutional questions, state or federal, which may have been presented on the record. (*Drainage Commissioners* v. *Shockey*, 238 Ill. 237, 239, 87 N. E. 335; *Gillespie* v. *Fulton Oil and Gas Co.*, 236 Ill. 188, 204, 86 N. E. 219.) Had petitioner made a timely motion to transfer the cause to the Illinois Supreme Court on the ground that a federal constitutional question was presented for decision, and had the Appellate Court denied said motion to transfer, then the petitioner could have applied to this court for a writ of certiorari to review said order of the Appellate Court denying to petitioner the opportunity to have the question passed upon by the Illinois Supreme Court. This, however, the petitioner did not do and, under the authorities, it is too late for him to raise any constitutional questions, state or federal, at this time.

In any event, petitioner has failed to include in the printed transcript of the record filed in this court any part of his petition for leave to appeal to the Supreme Court of Illinois from the judgment of the Appellate Court. Hence

the record does not show whether any federal question was presented to the Supreme Court of Illinois in the petition for leave to appeal which that court denied (R. 79-80).

Finally, an examination of the record reveals that no federal question was presented at all. The two basic questions involved were (1) whether a transcript of the evidence was necessary to support the Commission's decision where the findings of fact were sufficiently detailed and specific to show that there was evidence to support the order, and (2) whether, in any event, the petitioner was guilty of such gross laches in the prosecution of his action to review the order of the Civil Service Commission as to bar his right to relief. The Appellate Court held that in a common law certiorari proceeding to review an administrative order, the transcript of the evidence is no part of the record, and if the findings of fact are sufficiently specific to show that the order is supported by the evidence, it is not necessary or even proper to refer to the transcript of the testimony to determine whether there was evidentiary support for the administrative decision (R. 65-73). On the issue of laches, the Appellate Court held that petitioner was barred from obtaining relief because of his many years of delay in the prosecution of his action (R. 73-75). It is very apparent that the decision of the Appellate Court on either of these issues did not involve the determination of a federal question. On the contrary, the Appellate Court opinion shows that the decision which the petitioner seeks to review is based upon two separate and independent non-federal grounds each of which is adequate to support it.

Conclusion.

Inasmuch as the Appellate Court could not, and in any event did not, determine any federal question, it is re-

spectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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